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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LEONARD HOLLINGSWORTH , Defendant and Appellant.	A155121 (San Francisco City & County Super. Ct. No. SCN228670-03, 18000921)

Defendant was charged with one count of conspiracy to commit second degree robbery, two counts of second degree robbery, and two counts of misdemeanor grand theft by use of an access card with the intent to defraud. A jury acquitted defendant of the felony offenses but convicted him of one count of misdemeanor petty theft. Defendant contends his trial counsel, without his consent, improperly conceded his guilt of petty theft in violation of his state and federal constitutional rights to effective assistance of counsel, jury trial, confrontation, and against self-incrimination. We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Because the sufficiency of the evidence relating to defendant's conviction for petty theft and his sentence are not challenged, we briefly summarize the underlying facts.

Ms. C. was walking in San Francisco at 5:55 p.m. when she was accosted by three men near her home. She was carrying two purses, one on her shoulder and one across her

body. One purse was grabbed from her shoulder, and after she was pushed to the ground and punched in the shoulder, her second purse was stolen.

Ms. C.'s Chase credit card was taken during the robbery. It was used at 6:42 p.m. and 6:46 p.m. that same evening at Target to purchase Target gift cards totaling $424 and $116. Thereafter, it was used to purchase $95.45 in food at Mel's Drive-In. Time-stamped videos taken after the robbery was committed depicted defendant in Target and Mel's Drive-In. Notably, the Mel's Drive-In video shows defendant entering the restaurant with two other men at 6:53 p.m. and several minutes later standing at the register "holding what appears to be something into the key card reader." Defendant and three others were detained in the vicinity of Mel's Drive-In, and a Mel's Drive-In bag containing four boxed hamburger meals was located "in the area" of the four detained individuals. Before the group was detained, a San Francisco police officer spotted one of them with a "Mel's Diner" bag.[1]

During a booking search, an officer located Target gift cards on defendant's person, and found a blue Chase credit card bearing Ms. C.'s name "[o]n his left ankle."

An information charged defendant with one count of conspiracy to commit robbery (Pen Code,[2] § 182, subd. (a)(1); count I), two counts of second degree robbery (§ 211; counts II & III) and two counts of misdemeanor grand theft exceeding $950 by access card fraud (§ 484g, subd. (b); counts IV & V).

In the course of trial, the prosecutor dismissed count IV, misdemeanor grand theft, and the allegation in count V, stating the value of the property was in excess of $950, was stricken before the case was submitted to the jury.[3] As a result of striking this allegation, the jury was instructed defendant was charged in count V with misdemeanor petty theft by fraud with an access card. The count V verdict form asked the jury to determine if

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[1] Witnesses used Mel's Drive-In and Mel's Diner interchangeably.

[2] All statutory references are to the Penal Code.

[3] Pursuant to section 487, subdivision (a), a grand theft is committed when the "property taken is of a value exceeding nine hundred and fifty dollars ($950)."

defendant committed two transactions of petty theft by access card—use of the credit card at Target and use of the credit card at Mel's Drive-In.

The jury convicted defendant of count V, misdemeanor petty theft, by using Ms. C.'s Chase credit card to purchase Target gift cards and food items from Mel's Drive-In; otherwise the jury acquitted defendant of the charged felonies.

The trial court denied probation, sentenced defendant to one year in jail deemed served through pretrial credits, and imposed fines, fees, and restitution in an amount to be determined. In an unrelated matter, the court revoked defendant's probation, finding by a preponderance of the evidence defendant was "involved in a conspiracy to commit robberies." The court reinstated defendant's probation extending it one year and adding new program conditions.

On appeal, defendant challenges only the petty theft conviction, not the probation orders in the unrelated case.

II. DISCUSSION

Defendant argues his counsel's statements during closing argument violated his constitutional rights.

A. *Defense Counsel's Concession of Petty Theft*

During closing argument defense counsel conceded defendant committed petty theft. Counsel argued, "So I told you at the beginning of this case that Leonard never committed a robbery and he never committed a conspiracy to commit a robbery. But I did say that Leonard used credit cards that did not belong to him. That is what he did in this case. And that is what the evidence showed." At the close of his argument, counsel asked the jury to find defendant not guilty of the robberies and "conspiracies." The prosecutor, in his argument, noted the concession of guilt to petty theft.

B. *Governing Law and Standard of Review*

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215; accord, *McCoy v. Louisiana* (2018) ___ U.S. ___ [138 S.Ct. 1500, 1507] (*McCoy*).) Generally, "[t]rial

management is the lawyer's province: Counsel provides his or her assistance by making decisions such as 'what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence.' [Citation.] Some decisions, however, are reserved for the client—notably, whether to plead guilty, waive the right to jury trial, testify in one's own behalf, and forgo an appeal." (*McCoy*, at p. 1508; accord, *People v. Frierson* (1985) 39 Cal.3d 803, 812 [counsel has "traditional power to control the conduct of the case" but "with respect to certain fundamental decisions in the course of a criminal action, a counsel's control over the proceedings must give way to the defendant's wishes"].) When counsel overrides a defendant's autonomy on a fundamental decision that is reserved for the client, the defendant's Sixth Amendment rights are violated. (*McCoy*, at pp. 1507–1508.) "A violation of the client's right to maintain his or her defense of innocence implicates the client's autonomy (not counsel's effectiveness) . . . ." (*People v. Eddy* (2019) 33 Cal.App.5th 472, 480 (*Eddy*).) Accordingly, such an error is structural and not subject to harmless error review. (*McCoy*, at p. 1511.)

We review the legal question of whether defendant's constitutional rights were violated de novo. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894.)

C. *The Record Does Not Contain Evidence Defendant Objected to Defense Counsel's Concession*

Defendant asserts his federal and state constitutional rights to effective assistance of counsel, jury trial, confrontation, and against self-incrimination were violated because his trial counsel "conceded his guilt without his consent." Specifically, defendant argues defense counsel's concession of his guilt was tantamount to a guilty plea requiring a waiver of his constitutional rights.

As we shall explain, because defendant failed to object to defense counsel's strategy of conceding guilt, we conclude defendant's constitutional rights were not violated.

In support of his assertion his counsel improperly conceded guilt, defendant relies primarily on the United States Supreme Court's decision in *McCoy, supra*, 138 S.Ct.

1500, in which the court held defense counsel's concession of his client's guilt to the jury violated McCoy's constitutional rights. There, McCoy's defense counsel informed him two weeks before trial that he intended to concede McCoy's commission of a triple murder because the evidence against him was overwhelming and without a concession at the guilt stage, a death sentence at the penalty phase would be impossible to avoid. (*Id.* at p. 1506.) McCoy told counsel he did not want him to concede guilt, and counsel was aware of McCoy's opposition to counsel's strategy. McCoy insisted counsel pursue acquittal. Two days before trial, McCoy sought to terminate his counsel's representation. The trial court denied that request. At the commencement of defense counsel's opening statement, he conceded defendant's guilt. Out of earshot of the jury, McCoy protested, telling the court that counsel was " 'selling [him] out.' " (*Ibid*.) McCoy testified, proclaiming his innocence and pressing an alibi. During closing argument, defense counsel reiterated McCoy was the killer. The jury returned a guilty verdict of first degree murder on all three counts. Once again, in the penalty phase, counsel conceded McCoy committed the crimes. The jury returned three death verdicts. (*Id.* at p. 1507.)

The Supreme Court reversed the conviction, concluding that "a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." (*McCoy*, *supra*, 138 S.Ct. at p. 1505.) The court reasoned that while trial management is the lawyer's province to make decisions regarding arguments to pursue, evidentiary objections to raise, and agreements to make concerning the admissibility of evidence, some decisions are reserved for the client—"notably, whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." (*Id.* at p. 1508.) A defendant, according to the court, has the autonomy to assert his innocence. (*Ibid*.) And counsel may not admit a client's guilt of a charged crime "over the client's intransigent *objection* to that admission." (*Id.* at p. 1510, italics added.)

In its holding, the Supreme Court distinguished *McCoy* from *Florida v. Nixon* (2004) 543 U.S. 175, clarifying that in contrast to McCoy's adamant objections to any admission of guilt, Nixon never approved or protested counsel's admission of his guilt at

trial, and thus his autonomy was not negated. In fact, Nixon did not complain about the admission of guilt until after trial. (*McCoy, supra,* 138 S.Ct. at pp. 1505, 1509.)

Here, unlike *McCoy*, there is no evidence defendant raised any objection to counsel's decision to concede guilt on the petty theft. Nor is there any evidence counsel knew defendant objected to the concession, or ever instructed counsel not to pursue that tactic. And as noted in *McCoy*, " ' [n]o blanket rule demand[s] the defendant's explicit consent' to implementation of that strategy [of concession]." (*McCoy, supra,* 138 S.Ct. at p. 1505, quoting *Florida v. Nixon, supra,* 543 U.S. at p.192.) Nor is it the "trial court's duty to inquire whether the defendant agrees with his counsel's decision to make a concession, at least where, as here, there is no explicit indication the defendant disagrees with his attorney's tactical approach to presenting the defense." (*People v. Cain* (1995) 10 Cal.4th 1, 30.) Accordingly, defendant was not denied his constitutional rights to effective assistance of counsel, jury trial, confrontation, and against self-incrimination because the record does not demonstrate he objected in any manner to counsel's concession of guilt.

Our analysis is consistent with other California courts that have reviewed the issue since the *McCoy* case. In *People v. Lopez* (2019) 31 Cal.App.5th 55, defense counsel, during opening statement, conceded Lopez was guilty of hit-and-run, but was not guilty of murder. (*Id.* at p. 62.) As here, Lopez argued his counsel's concession was "tantamount to a guilty plea." (*Ibid.*) And like the instant matter, no evidence was presented indicating Lopez, at any time, raised any objection to his attorney's decision to concede guilt on the hit-and-run charge. In upholding his convictions for hit-and-run driving and murder, the court stated, "In sum, we have found no authority, nor has appellant cited any, allowing extension of *McCoy*'s holding to a situation where the defendant does not expressly disagree with a decision relating to his right to control the objective of his defense." (*Id.* at p. 66.)

In *Eddy, supra,* 33 Cal.App.5th 472, applying *McCoy,* the court held Eddy's right to counsel had been violated by his counsel's admission of Eddy's guilt in closing argument. In that case, defense counsel presented an innocence defense during his

opening statement, and Eddy did not testify. (*Id.* at pp. 477, 47**9**.) One day later, after failing to present an affirmative defense, trial counsel conceded in closing argument that Eddy had committed a lesser included offense but was not guilty of the greater offenses. (*Id.* at p. 477.) During a posttrial *Marsden*[4] hearing, defense counsel admitted he knew Eddy wanted to go forward with an innocence defense, but explained he was committed to making the closing argument conceding guilt on the lesser offense. In counsel's opinion, concession was the best tactic. (*Eddy*, at p. 478.) Eddy told the trial court that he advised counsel "not to go that route, and he had done it anyway." (*Id.* at pp. 478–479.) The appellate court, consistent with *McCoy*, held: "The *Marsden* hearing record establishes that trial counsel knew that defendant did not agree with the strategy of conceding manslaughter [(a lesser included offense of murder)] in closing argument . . . . [I]n context it is clear counsel was instructed not to make the argument but did so anyway because of counsel's judgment that it was in defendant's best interests." (*Id.* at pp. 481–482, fns. omitted.)

Eddy does not control the outcome of our case because, unlike *Eddy*, there is nothing in the record to establish defense counsel knew defendant objected to a concession strategy or that defendant ever instructed his counsel not to pursue such a tactic. In absence of such a record, no basis exists under *McCoy* upon which to find any constitutional violation.

Defendant's reliance on *People v. Farwell* (2018) 5 Cal.5th 295, is also unavailing. *Farwell* held "Because the record [was] insufficient to establish that Farwell entered a constitutionally valid waiver of his trial rights," the stipulation entered through his trial counsel admitting all the elements of the charged crime must be set aside. (*Id*. at pp. 298, 308.) Such is not the case here. Neither defendant nor his attorney entered a stipulation admitting the elements of the petty theft charge.

III. DISPOSITION

Accordingly, the judgment is affirmed.

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[4] *People v. Marsden* (1970) 2 Cal.3d 118.

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Margulies, Acting P. J.

We concur:

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Banke, J.

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Sanchez, J.

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